No. 81-2293

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE CONNECTICUT LIGHT AND POWER COMPANY, *ET AL.*
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. The government asserts (Br. in Opp. p. 6) that we have misinterpreted the NRC's rule, and insists that the rule provides four, not three, methods for fire protection of redundant safe shutdown circuits. The argument illustrates the difficulty created by the court of appeals' decision.[1]

The NRC's proposed rule, consistent with then-existing policy, specified that licensees could protect safe shutdown circuits with a variety of protective features, as warranted by a fire hazards analysis (Pet. App. C pp. 10, 19-20). The final rule prescribed three design criteria, and discarded other combinations of protective features as unacceptable (Pet. App. B pp. 41-43). NRC counsel persuaded the court of appeals that the rule's exemption procedure is equivalent to a fourth alternative that would permit the very fire hazards analysis approach which the NRC had abandoned. Aside from the fact that this

[1] Petitioners in this case are listed in footnote 1 to the petition.

was a *post hoc* rationalization at oral argument (see Br. in Opp. p. 8 n.9),[2] the argument lacks logic and fairness.

The government's current interpretation contradicts the rule itself. The proposed rule provided that a fire hazards analysis was to be the exclusive means for demonstrating protection of redundant safe shutdown circuits.[3] The final rule rejected fire hazards analyses in favor of three rigid separation criteria because, according to the NRC, "[i]t is not possible to predict the specific conditions under which fires may occur and propagate" (Pet. App. B pp. 15-16) – in other words, the NRC then believed that fire hazards analyses were not adequate tools for identifying necessary protective features. The court of appeals agreed that the Commission "abandoned the postulated hazards approach" in the final rule (Pet. App. A p. 7). The government's argument regarding exemption as a fourth alternative may seem to offer a solution to the difficulties created by defects in the rule and procedural irregularities in its formulation. But the result is unfair.

The rule does not permit a fire hazards analysis *independent* of the three criteria. It provides that an exemption will be granted only if the protective features proposed by a licensee are shown to be equivalent to the three specific requirements in the rule (Pet. App. A p. 20). The result is unfair because the requirements were neither justified on the merits nor adopted after notice and opportunity for comment. The court of appeals apparently accepted Commission counsel's view that to qualify

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[2] The court of appeals' acceptance of NRC counsel's representations (Pet. App. A p. 17) was itself error. A reviewing court "cannot 'accept appellate counsel's *post hoc* rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.' " *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974), quoting from *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962) and *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

[3] The government's suggestion (Br. in Opp. p. 3, n. 1) that the proposed rule included specific separation requirements is inaccurate. The relevant provision stated only that if redundant equipment was separated by 50 horizontal feet or by three-hour barriers, the licensee would not have to perform the fire hazards analysis otherwise required.

for exemption, the licensee would have to "prove that another method works as well as one of the three stipulated by the NRC" (Pet. App. A pp. 16-17). The court thus placed the burden on licensees to show that a proposed alternative would be equivalent to the three criteria, which were themselves neither justified nor properly adopted. And, at the same time, the court denied petitioners' challenges to the three criteria themselves, because of the availability of exemption.

The result is a vicious "Catch-22". The court of appeals fended off petitioners' objections to the three criteria—*e.g.*, that the NRC did not expose the three standards to public scrutiny or comment, and failed to disclose an adequate basis and purpose for them—by relying on the exemption provision. But to qualify for exemption, licensees must show equivalence to the very criteria from the justification and exposition of which the court excused the Commission. The court's decision thus effectively sanctions the limited criteria, puts the industry to the task of meeting their equivalent (or perhaps attempting to attack the now presumptively valid regulation in an exemption proceeding), and thoroughly relieves the Commission from any burden of justifying the standards to which exemption requests must be directed. Although the government accuses petitioners of misinterpreting the rule, it fails to acknowledge the implications of its own analysis.[4]

2. The government (Br. in Opp. p. 6) points to other agency rules containing waiver or special relief provisions that have been affirmed by this Court, and concludes that because the NRC's fire protection rule is one of the same "type", there is no reason for further review here. But we do not question the NRC's authority or duty to provide relief from rules of general applicability. Indeed, "an effective waiver mechanism may be necessary to assure that [an agency's]

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[4] The government's assertion (Br. in Opp. p. 6, n. 7) that utilities have "recognized" its interpretation is nonsense. If anything, the large numbers of exemption requests pending before the NRC reflect the difficulties that the rule has caused the industry—which difficulties, among other things, were the impetus for review proceedings in the court of appeals.

rule affords due process," *Southwest Pennsylvania Cable TV, Inc.* v. *FCC*, 514 F.2d 1343, 1347 (D.C. Cir. 1975). *See also Community Service, Inc.* v. *United States*, 418 F.2d 709, 711-712 (6th Cir. 1969) (a general rule with no provision for relief may offend constitutional due process requirements).

The issue presented by the court of appeals' decision is not whether administrative agencies may include a provision for exemption in a rule of general applicability—concededly, they may or even must—but whether a reviewing court may rely on the availability of special relief to excuse shortcomings in the agencies' formulation of the rule itself. The cases on which the government relies hold, to the extent relevant here, only that a special relief mechanism in an agency rule is appropriate, if not required.[5]

3. The government also contends (Br. in Opp. 7) that the court of appeals did not find technical or procedural inadequacies in the NRC's rulemaking. The government's error is reflected by the opinion itself. It is a fact, for example, that the three criteria for protection of redundant safe shutdown circuits appeared for the first time in the final rule, and thus that petitioners had no opportunity to comment on the criteria themselves or the NRC decision to limit protective features to those three criteria (Pet. App. A p. 6). The court explicitly based its decision to excuse the Commission from the notice-and-comment requirements of the Administrative Procedure

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[5] The cases cited by the government (Br. in Opp. 6) primarily involved questions as to agencies' authority to act by rule, as for example whether individual "hearings" were required before the agency could impose industry-wide requirements. The availability of special relief in such cases was of tangential importance. We note, however, that in *Permian Basin Area Rates Cases*, 390 U.S. 474 (1968), the Court carefully scrutinized the agency's rulemaking procedure and the record to insure that the rule was fully supported, even though the rule provided for special relief. By comparison, the court of appeals in this case did not analyze the procedural and substantive integrity of the NRC's rule independently, but improperly relied on the exemption mechanism to excuse full compliance by the agency with the requirements of law. *See also FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802-815 (1978) (reasonableness of rulemaking carefully scrutinized despite provision for exemption).

Act on the exemption procedure (Pet. App. A pp. 16-17). The court also responded to petitioners' arguments that the rule's cable separation requirements lacked support in the record by observing that certain material provided only "some record support", yet concluded (Pet. App. A p. 20):

> In light of the fact that the exemption procedure will allow power plants to show that alternative measures provide equivalent safety protection, we find that the record provides sufficient support for that aspect of the fire protection program* * *.[6]

The court of appeals found no record support for the final rule's refusal to include fire retardant coatings as a protective device, but relied on the exemption procedure to ameliorate the impacts of the NRC's decision (Pet. App. A pp. 20-21). Finally, the court of appeals brushed aside arguments directed to another aspect of the final rule, concluding that "[o]nce again, however, the exemption procedure is crucial" (Pet. App. A p. 21).

In short, petitioners' objections to the NRC's rulemaking were repeatedly met by the court's reference to the exemption

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[6] The court of appeals accepted the Commission's invitation to rely on licensees' "common knowledge" of nuclear power plant fire protection problems as a technical basis for the proposed and final rules (see Br. in Opp. p. 5, n. 6). To permit an agency to rely on some nebulous body of "common knowledge" in proposing a rule for comment is to emasculate the procedural requirements of the Administrative Procedure Act, which requires full disclosure of the proposed rule's basis and purpose. Moreover, as a practical matter, it is factually incorrect to assume, as did the court of appeals at the NRC's urging, that each licensee had knowledge of fire protection developments at each of the other 70-odd operating plants licensed by the Commission.

procedure as excusing procedural irregularities. The government's suggestion to the contrary finds no support in the court of appeals' opinion.

Respectfully submitted,

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